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IN THE

Supreme Court of the United States

No. 929. October Term, 1944.

PAULINE E. BARRY, Administratrix of the ESTATE OF RALPH E. BARRY, deceased,
Petitioner,

vs.

READING COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ARGUMENT.

The brief filed by counsel for the respondent goes far beyond the issues presented by the petition and brief in support thereof. Petitioner did not attempt to argue the merits of the case in this preliminary proceeding. However, the issues having now been raised, a reply in kind necessarily is indicated.

All of the criticisms made of the petitioner's Statement of the Case are based upon a view of the evidence that is entirely one-sided. The facts concerning the general negligence of the respondent as we stated them therein are those which the jury may well have found had the issues been properly presented to them by the trial court. On the other hand, the evidence of respondent's witnesses as to the efficiency of the brake was entirely inadmissible and should never have been submitted to the jury. Nowhere has petitioner sought to give the impression that a properly instructed jury was **required** to accept petitioner's evidence or the inferences therefrom drawn by her counsel. In stating the conflicts in the evidence on the issues presented in the petition, respondent has made it even more apparent that these issues are such as should move this Court to grant certiorari and to consider whether or not this employe's widow and her child have not been denied their constitutional right to a fair trial on every issue presented by the evidence.

(1)

Respondent states its position on this point in the language of the majority opinion of the Circuit Court of Appeals (382-383). No better answer could be conceived than the clear and simple language of the dissenting opinion of Judge Biggs (384-387). The great importance of an

authoritative decision construing this Order of the Commission is made apparent by this diversity of opinion.

In all of its argument as to the required dimensions of the brake-shaft and ratchet-wheel, respondent has completely ignored the **basic** requirement of the Order: that the ratchet-wheel be "secured." A hand brake is not "efficient" under the Act unless the ratchet-wheel **is secured** to the brake-shaft. Although the obvious meaning of the word "secured" is easily ascertained, it is not necessary to go beyond this very Order to find the intent of the Commission in using the term. The same Order uses it in four other places: "to secure the hand brake wheel"; "secured to brake shaft drum"; and "secured by riveting" in two places. And the terms "securely supported" and "securely fastened" are used no less than eleven times in the following standards. Here are three methods of "securing" appliances provided for in a single Order: by a square fit, by riveting, and by a key. Is it conceivable that the result to be accomplished is different in any one method of "securing" than in any other? Certainly the effect of riveting or use of a key is to make the two parts operate as a single unit, without looseness or play. Equally true it must be that in using a square fit the application must be such that the same result is obtained. The minimum relative dimensions of one and one-fourth (1¼) inches **in diameter** for the brake shaft and one and five-sixteenths (1 5/16) inches **square** for the ratchet-wheel can leave a space of **only one-thirty-second (1/32) of an inch on each side** of the shaft so that the two parts will operate as a unit—be "secured". When the play between them increases beyond this dimension—up to **three-sixteenths (3/16) of an inch** as in the instant case—or when the parts are not "secure" but are "loose" as described by the witnesses, there can be no doubt that a violation of the Act and the Regulations exists and should be recognized by the Court.

Respondent entirely overlooks the fact that the Commis-

sion has specifically declared that "brake shaft loose" or "ratchet wheel loose" are defects which render the hand brake inefficient. At no time during the trial was the jury instructed or permitted to know that the brake had to conform to these regulations and that, if it did not, a violation of the Act existed.

On the contrary, the instructions of the Court were entirely misleading: they interpreted the Order of the Commission as requiring only compliance with **minimum** dimensions; and they permitted the jury to find that the brake was safe and efficient even though its parts were loose in direct violation of the defect classification.

(2)

Respondent has made no attempt to justify the admission of the testimony here in question. It ignores the primary distinction between the testimony of plaintiff's expert and that of defendant's car inspectors. Witness Tettemer was asked by plaintiff to express his opinion **solely** upon facts already proved and admitted in the record. Defendant's inspectors, on the contrary, were permitted to give testimony based upon no admissible evidence and in the face of admissions by the first inspector to see the car that he **did not know** whether it was in the same condition as at the time of the accident (215a-216a, 223a).

The authorities cited certainly do not support any theory that secondary and speculative evidence may be admitted in the unreviewable discretion of the Trial Judge while the party offering it is clearly shown to be suppressing the primary and available evidence in the case. If the issue is in fact one of discretion, we do not hesitate to say that the admission of this evidence amounted to a clear abuse of it.

In its quotation from Dean Wigmore, respondent has

omitted a pertinent sentence. We quote from the last edition of his work:

> "They may be roughly grouped into two classes,—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which such preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look or to wish for any detailed rules."
>
> II *Wigmore on Evidence*, Sec. 437, p. 414.

In the case of *Marathon Lumber Co. v. Dennis*, 296 F 471, cited, it was the plaintiff who was permitted to show the subsequent existence of a defect in an axle which remained in the **possession of the defendant.** The same is true of the draincock in *O'Brien v. Las Vegas & T. R. Co.*, 242 F. 850 and *Boston Excelsior Co. v. Sweatt*, 229 F. 321, cited. In none of the numerous cases cited by Wigmore will it be found that without prior proof of similarity of conditions, proof of subsequent condition of an appliance capable of being dismantled in a few minutes (215-216a) has been admitted.

(3)

It is difficult to conceive that Respondent had read the case of *Stewart v. B. & O. R. R. Co.*, 137 F 2d 527, before writing its brief. Judge Hand specifically states (529):

> "It . . . excluded his affidavit (Exhibit A) in spite of the fact that Edman testified the affidavit was true and though it contained evidence somewhat inconsistent with his other testimony."

The exclusion of the testimony was one of the grounds for **reversal** of the court below. The opinion does cite two decisions of the New York Courts but it also relies upon

United States v. Freundlich, 95 F 2d 376, 379.

The Federal rule is not at variance with the cited case:

United States v. Lonardo, 67 F 2d 883;
London Guarantee Co. v. Woelfle, 83 F 2d 325.

Respondent's quotation from Dean Wigmore ignores the more progressive rule which he discusses at length in the third edition of his work.

III *Wigmore on Evidence* (3rd Ed.) Sec. 1018, p. 687:

> "It does not follow, however, that Prior Self-contradictions, when admitted, are to be treated as having no **affirmative testimonial** value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. . . . The whole purpose of the Hearsay rule has already been satisfied."

Even the general rule, that prior contradictory statements, the truth of which is denied or not affirmed, may be used only for impeaching purposes has received responsible criticism and has been strictly limited, so that some affirmative weight may be given them, if the witness is subject to cross-examination:

Di Carlo v. United States, 6 F. 2d 364 (CCA-2), certiorari denied, 268 U. S. 706;
Curtis v. United States, 67 F. 2d 943, 945, 946 (CCA-10);
United States v. Block, 88 F. 2d 618, 620 (CCA-2);
Chicago, St. P. & C. Ry. Co. v. Kulp, 102 F. 2d 352, 358 (CCA-8) certiorari denied 307 U. S. 636.

Argument

It is an established principle that where a witness called by a party testifies adversely, he may be impeached by contradictory statements to overcome the effect of his adverse testimony, and if he does not admit the truth of the contradictory statements, the party has the right to introduce other evidence to show that the facts are otherwise than as testified to by the witness: (*Hickory v. United States,* 151 U. S. 303, 309.) It is submitted that, by the same principle, there can be no evidence of greater weight than the prior signed statement of the witness himself, when he admits truth of the contradictory statements, that the facts are otherwise than as he has testified.

It is an elementary rule of evidence that where a witness gives self-contradictory testimony, the trier of the facts may accept whichever of the contradictory versions he believes to be true.

Craig v. United States, 81 F. 2d 816 (CCA-9), certiorari denied 298 U. S. 690;
Ryan v. United States, 99 F. 2d 864 (CCA-8), certiorari denied 306 U. S. 635.

In *Craig v. United States,* 81 F. 2d 816, the court said (p. 828):

> "The mere fact, however, that a witness' testimony is self-contradictory does not prevent its constituting substantial evidence."

There is no difference in principle between the situation where the witness gives contradictory testimony while testifying, either on direct examination or on cross-examination, and the situation here presented where the witness being examined under oath as to the truth of the prior statements, in effect, gives self-contradictory testimony by affirming the truth of the prior statements. In both situations the contradictory statements constitute affirmative, substantive and substantial evidence.

No. 929

INTERSTATE COMMERCE COMMISSION
BUREAU OF SAFETY

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

July 1, 1925

INTERSTATE COMMERCE COMMISSION

BUREAU OF SAFETY

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

July 1, 1935

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

For sale by the Superintendent of Documents, Washington, D. C.
Price 5 cents

REFERENCE LETTERS

(*A*) Considered as defects only when contour lines allow lost motion sufficient to approach the danger point as shown by standard worn coupler limit gage.

(*B*) In determining defects of this class car must be standing on approximately level track when measurements are taken. State height.

(*C*) Describe defects.

(*D*) Considered as defects only when unsafe or inoperative.

CLASSIFICATION OF SAFETY APPLIANCE DEFECTS

COUPLER

(State name and type of coupler.)

1. Coupler body broken.
2. Coupler body missing.
3. Coupler out of contour (*A*)
4. Coupler too high. (*B*)
5. Coupler too low. (*B*)
6. Carrier iron defective. (*C*)
7. Draft gear or attachments defective. (*C*)
8. Excessive free slack in draft gear. (More than 1½ inches.) (*C*)

KNUCKLE

9. Knuckle broken.
10. Knuckle missing.
11. Knuckle worn. (*A*)
12. Knuckle wrong. (*D*)
13. Knuckle pin bent.
14. Knuckle pin broken.
15. Knuckle pin missing.
16. Knuckle pin worn. (*A*)
17. Knuckle thrower missing, defective or inoperative. (*C*)

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LOCK BLOCK

18. Lock block bent.
19. Lock block broken.
20. Lock block missing.
21. Lock block worn. (*A*)
22. Lock block disconnected.
23. Lock block wrong. (*D*)
24. Lock block inoperative.
25. Lock block key missing.
26. Lock block trigger missing.
27. Lock set missing.
28. Lock lift defective or inoperative. (*C*)
29. Lock lift missing.
30. Lock lift wrong or incorrectly applied. (*C*–*D*.)

UNCOUPLING MECHANISM

(State name of patented uncoupling mechanism found defective.)

31. Uncoupling lever bent. (*D*)
32. Uncoupling lever broken.
33. Uncoupling lever missing.
34. Uncoupling lever wrong or incorrectly applied. (*C*)
    (Includes uncoupling levers too long, too short, or otherwise of wrong dimensions, or not having the required clearance around handle.)
35. Uncoupling lever disconnected.
    (This refers to uncoupling levers consisting of two or more sections.)
36. Uncoupling lever inoperative.

37. *Uncoupling lever handle too low.
38. *Uncoupling lever stop broken, loose or incorrectly applied. (*C*)
39. *Uncoupling lever stop missing.
40. Uncoupling chain or other connecting device broken or disconnected. (*C*)
41. Uncoupling chain or other connecting device missing.
42. Uncoupling chain or other connecting device kinked.
43. Uncoupling chain or other connecting device too long.
44. Uncoupling chain or other connecting device too short.

END LOCK

(Refers to bracket or casting supporting outer end of uncoupling lever.)

45. End lock or casting bent.
46. End lock or casting broken.
47. End lock or casting loose. (*D*)
48. End lock or casting missing.
49. End lock or casting wrong. (*D*)

KEEPER

(Refers to bracket or casting supporting inner end of uncoupling lever.)

50. Keeper bent.

* Defects 37, 38, and 39 apply only to levers of the rocking or push down type.

51. Keeper broken.
52. Keeper loose. (*D*)
53. Keeper missing.
54. Keeper wrong. (*D*)

VISIBLE PARTS OF AIR BRAKE

55. Air brake cut out.
56. Cylinder and triple valve not cleaned within required period. State type of equipment and date of last cleaning.
57. Cylinder and triple cleaned; no date.
58. Air hose missing.
59. Air hose defective. (*C*)
60. Angle cock missing.
61. Angle cock defective. (*C*)
62. Angle cock handle broken.
63. Angle cock handle missing.
64. Brake pipe broken.
65. Brake pipe loose.
66. Angle cock bracket defective.
67. Conducting pipe defective.
    (Refers to connection between brake cylinder and reservoir.)
68. Branch pipe defective.
    (Refers to the connection between brake pipe and triple valve.)
69. Cut-out cock defective. (*C*)
70. Cut-out cock missing.
71. Cylinder casting defective.
72. Cylinder loose or missing. (*C*)

73. Reservoir casting defective.
74. Reservoir loose or missing. (*C*)
75. Triple valve defective. (*C*)
76. Triple valve missing.
77. Release valve defective. (*C*)
78. Release valve missing.
79. Release rod defective. (*C*)
80. Release rod missing.
81. Release rod disconnected.
82. Retaining valve defective or insecurely fastened. (*C*)
83. Retaining valve missing or incorrectly applied. (*C.*)
84. Retaining pipe defective.
85. Retaining pipe missing.
86. Piston travel excessive.
    (Considered as defect when travel exceeds 10 inches.)
87. Push rod defective. (*C*)
88. Push rod missing.
89. Air brake inoperative.

HANDHOLD

(State location.)

90. Handhold bent.
91. Handhold broken.
92. Handhold loose.
93. Handhold missing.
94. Handhold wrong dimensions. (*C*)
95. Handhold not having proper clear length or clearance. (*C*)
96. Handhold incorrectly located or applied. (*C*)

HANDRAIL

(State location.)

97 Handrail bent or not having proper clearance. (*C–D*)
98. Handrail broken.
99. Handrail loose.
100. Handrail missing.
101. Handrail wrong dimensions. (*C*)
102. Handrail incorrectly located or applied. (*C*)

LADDER

(State location.)

103. Ladder tread bent.
104. Ladder tread broken.
105. Ladder tread loose.
106. Ladder tread missing.
107. Ladder tread without foot-guard.
108. Ladder tread not having proper clear length or clearance. (*C*)
109. Ladder treads incorrectly spaced.
110. Ladder stile bent.
111. Ladder stile broken.
112. Ladder stile loose.
113. Ladder missing or loose. (*C*)
114. Ladder incorrectly applied. (*C*)
115. Ladder incorrectly located. (*C*)
116. End ladder clearance inadequate. (*C*)

RUNNING BOARD

(Includes both longitudinal and latitudinal running boards. State location of defect.)

117. Running board broken, or decayed. (*C*) (*D*)
118. Running board loose.
119. Running board missing.
120. Running board wrong dimensions. (*C*)
121. Running board not properly secured to car. (*C*)
122. Running board brace broken.
123. Running board brace loose.
124. Running board brace missing.
125. Running board cleat broken.
126. Running board cleat loose.
127. Running board cleat missing.
128. Running board obstructed. (*C*)
129. Running board saddle block missing or defective (*C*)

BRAKE SHAFT

130. Brake shaft bent. (*D*)
131. Brake shaft broken.
132. Brake shaft loose.
133. Brake shaft missing.
134. Brake shaft wrong dimensions. (*C*)
135. Brake shaft welded.
136. Brake shaft incorrectly applied. (*C*)
137. Brake shaft top nut missing or insecure. (*C*)
138. Brake shaft not properly secured to prevent being raised out of operating position. (*C*)

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BRAKE WHEEL

139. Brake wheel with insufficient clearance. (*C*)

NOTE.—This applies both to (a) clearance around rim of brake wheel, and to (b) the distance from outside edge of brake wheel to a vertical plane parallel with end of car passing through inside face of knuckle when closed with coupler horn against buffer block or endsill.

140. Brake wheel bent. (*D*)
141. Brake wheel broken.
142. Brake wheel loose.
143. Brake wheel missing.
144. Brake wheel incorrectly applied.
145. Brake wheel wrong dimensions.

RATCHET WHEEL

146. Ratchet wheel broken.
147. Ratchet wheel loose.
148. Ratchet wheel missing.
149. Ratchet wheel incorrectly applied.
150. Ratchet wheel wrong dimensions or insufficient number of teeth. (*C*)

BRAKE PAWL

151. Brake pawl broken.
152. Brake pawl loose.
153. Brake pawl missing.
154. Brake pawl inoperative. (*C*)
155. Brake pawl incorrectly applied. (*C*)

BRAKE STEP

156. Brake step bent or broken. (*C-D*)

157. Brake step loose.
158. Brake step missing.
159. Brake step incorrectly applied. (*C*)
160. Brake step wrong dimensions. (*C*)
161. Brake step brace bent. (*D*)
162. Brake step brace broken.
163. Brake step brace loose.
164. Brake step brace missing.
165. Brake step brace incorrectly applied or wrong dimensions. (*C*)

BRAKE SHAFT STIRRUP

166. Brake shaft stirrup bent.
167. Brake shaft stirrup broken.
168. Brake shaft stirrup loose.
169. Brake shaft stirrup missing.
170. Brake shaft stirrup wrong. (*D*)

BRAKE SHAFT SUPPORT

171. Top brake shaft support broken.
172. Top brake shaft support loose.
173. Top brake shaft support missing.
174. Top brake shaft support incorrectly applied.
175. Brake shaft bracket loose.
176. Brake shaft bracket missing.
177. Brake shaft bracket incorrectly applied.

RATCHET BRAKE

(State name of ratchet brake found defective)
178. Ratchet lever bent, broken or with improper clearance. (*C*)

179. Ratchet lever missing.
180. Ratchet pawl broken or missing. (*C*)
181. Ratchet pin or key missing.
182. Ratchet cap missing.
183. Ratchet gear broken.

GEAR BRAKE

(State name of gear brake found defective.)
184. Gear brake defective. (*C*)

BRAKE CHAIN

185. Brake chain disconnected.
186. Brake chain broken.
187. Brake chain missing.
188. Brake chain worn or wrong dimensions. (*C–D*)
189. Brake chain incorrectly secured to shaft.
190. Brake chain incorrectly applied or too long. (*C*)

HAND BRAKE ROD

191. Hand brake rod disconnected, broken or missing. (*C*)
192. Hand brake rod worn or defective. (*C–D*)
193. Hand brake rod too long.
194. Hand brake sheave wheel defective or missing. (*C*)

TOP TRUCK ROD

195. Top truck rod disconnected, broken, or missing. (*C*)
196. Top truck rod worn or defective. (*C–D*)
197. Top truck rod improper length. (*D*)
198.

BOTTOM TRUCK ROD

199. Bottom truck rod disconnected, broken, or missing. (*C*)
200. Bottom truck rod defective. (*C*)
201. Bottom truck rod improper length. (*D*)
202.

CYLINDER ROD

203. Cylinder rod disconnected, broken or missing. (*C*)
204. Cylinder rod defective. (*C*)
205. Cylinder rod improper length. (*D*)
206.
207.
208.
209.

FLOATING LEVER FULCRUM

210.
211. Floating lever fulcrum broken, loose, missing or defective. (*C*)
212.
213.



CYLINDER LEVER

214. Cylinder lever disconnected, broken, bent, or missing. (*C*)
215. Cylinder lever guide defective. (*C*)
216.
217.

FLOATING LEVER

218. Floating lever disconnected, broken, bent, or missing. (*C*)
219. Floating lever guide defective. (*C*)
220.
221.

TRUCK LEVERS

222. Truck live lever disconnected, broken, bent, or missing. (*C*)
223.
224.
225. Truck dead lever disconnected, broken, bent, or missing. (*C*)
226. Truck dead lever defective. (*C*)
227. Truck dead lever fulcrum disconnected, broken, missing, or defective. (*C*)
228
229.

BRAKE BEAM

230. Brake beam safety support defective. (*C*)
231. Brake beam or attachments defective. (*C*)
(Report guide pins missing on outside hung brake beams only.)
232. Brake beam fulcrum defective. (*C*)

BRAKE SHOE

233. Brake shoe missing.
234. Brake shoe broken. (*D*)
235. Brake shoe key missing.

BRAKE HANGER

236. Brake hanger bent. (*D*)
237. Brake hanger broken.
238. Brake hanger missing.
239. Brake hanger wrong. (*C–D*)
240. Brake hanger support defective. (*C–D*)
241. Brake hanger connecting pin missing. (State location.)
242. Brake hanger connecting pin wrong. (State location.)

COTTER KEYS FOR FOUNDATION BRAKE RIGGING

243. Brake hanger pin cotter key missing. (State location.)
244. Floating lever connecting pin cotter key missing.
245. Cylinder lever connecting pin cotter key missing.
246. Dead lever connecting pin cotter key missing.
247. Live lever connecting pin cotter key missing.
248.



HAND BRAKE

249. Hand brake missing.
250. Hand brake inoperative. (*C*)
251. Hand brake inefficient. (*C*)

SILL STEP

252. Sill step bent.
253. Sill step broken.
254. Sill step loose.
255. Sill step missing.
256. Sill step wrong dimensions. (*C*)
257. Sill step incorrectly located or applied. (*C*)

PLATFORM SILL STEP

(Hangers and back stops to be included under following numbers and described in column covering remarks.)

258. Platform sill step bent.
259. Platform sill step broken.
260. Platform sill step loose.
261. Platform sill step missing.
262. Platform sill step wrong dimensions. (*C*)
263. Platform sill step incorrectly applied. (*C*)

SIDE DOOR SILL STEP

264. Side door sill step bent.
265. Side door sill step broken.
266. Side door sill step loose.
267. Side door sill step missing.
268. Side door sill step wrong dimensions. (*C*)
269. Side door sill step incorrectly located or applied. (*C*)

FOOT-BOARD SILL STEP

270. Foot-board sill step bent.
271. Foot-board sill step broken.
272. Foot-board sill step loose.
273. Foot-board sill step missing.
274. Foot-board sill step wrong dimensions. (*C*)
275. Foot-board sill step incorrectly located or applied. (*C*)

PILOT SILL STEP

276. Pilot sill step bent.
277. Pilot sill step broken.

278. Pilot sill step loose.
279. Pilot sill step missing.
280. Pilot sill step wrong dimensions. (*C*)
281. Pilot sill step incorrectly located or applied. (*C*)
282.
283.
284.
285.

STEP FOR HEADLIGHT

286. Step for headlight bent, broken, loose or missing. (*C*)
287. Step for headlight not suitable for use. (*C*)
288.

POWER BRAKE

289. Power driving-wheel brake missing.
290. Power driving-wheel brake defective. (*C*)
291. Locomotive not equipped with appliances for operating train brake systems.

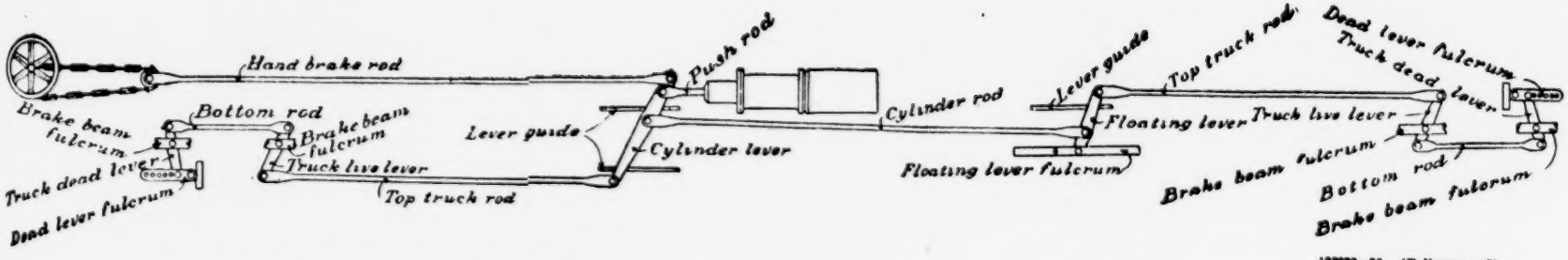


292.
293.
294.
295.
296.
297.
298.
299.

ASH PANS

300. Ash pan defective. (*C*)

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Argument

The Federal decisional law governs each and every one of the issues arising in a suit under the Federal Employers' Liability Act and the Safety Appliance Acts:

Jacobs v. Reading Co., 130 F. 2d 612.

This must necessarily include uniformity in the rules governing the admissibility and effect of the evidence in causes that are governed and controlled by Federal Acts.

(4)

It is difficult to conceive that respondent seriously urges that it was misled by the brevity of the averment of general negligence. That it fully comprehended its purpose and meaning is apparent from the nature of defendant's Answer. The defense of contributory negligence there specifically raised (6a) had no possible reference to any **other** part of the Complaint. **This defense was never withdrawn or stricken.** In addition the defendant was fully aware of its rights under Rule 12(e) of the Federal Rules. Under it defendant could have moved "for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity. . . ." That the averments **were** sufficiently definite and particular is evidenced by defendant's failure to so move, and that they were understood precisely in the light that they were pleaded is unquestionably demonstrated by the defense offered. It must further be stated that full and complete depositions were taken prior to trial so that the **evidence** upon which was based the claim of liability under the Federal Employers' Liability Act was entirely familiar to it.

In our original Brief we have pointed out that there is no pre-trial order limiting the issues at the trial. Certainly the loose language of counsel in discussion cannot now be

construed as a waiver of petitioner's substantive and constitutional rights:

> *Lilly v. Grand Trunk W. R. Co.*, 317 U. S. 481, 489; 63 S. Ct. 347.

Respondent's reliance upon the case of *Louisville & N. R. Co. v. Stewart*, 283 Ky. 585, 142 S. W. 2d 119, is indicative of the weakness of its position. That decision **recognizes** that the duty to provide a safe place to work is not limited to defects in defendant's realty. This duty of the employer extends to the operations of its employees and of its equipment. Had the **Stewart** case been tried under the Federal Rules instead of the hide-bound Kentucky practice, we have no doubt that the conclusion reached must also have been different.

An argument is made that plaintiff's submission of 18 other requests indicated an abandonment of her Request #2. This hardly merits discussion. The Request #2 (343a) completely covered the question involved and the existence of many other requests could not limit or affect the error in refusing to give it.

Respondent's justification of the Court's refusal to charge in accordance with plaintiff's second oral request (341a) is purely captious. The request was not refused by the Trial Judge because of any nice distinctions in the language used. The Court refused to accept the language and the **theory** forming the basis of the request precisely as he had eliminated this theory from the entire charge.

The basic fallacy of respondent's position is clearly demonstrated in its next argument. It analyzes the testimony in the **light most favorable to it,** assuming the truth of patently unbelievable evidence given by its own witness. Petitioner's position here is not that the jury **must** have disbelieved this testimony but that she had a **constitutional right to have it** submitted to the jury in a proper charge. We do conceive that the testimony of the witness, Rihm, was entirely unbelievable in the face of the physical facts and the patent

conclusion that no one else but Barry could have set the brakes on his car. The proximity of the two drafts as they proceeded down the hump (21a, 22a) was sufficient for the jury to find that they had been crowded; Rihm's admission that he violated the rule, custom and practice in not keeping a lookout to the rear (25a, 309a, 312a) was a clear act of negligence. Rihm was an inexperienced or green brakeman (308a). The relative speeds of the cars appears at 311a; the purpose of Rihm's stopping at 315a; the collision at 315a; that Barry's car immediately stopped at 310a; that the car could not physically have gone 8 or even 3 or 4 car lengths is fixed by the position of Barry's body (30a, 31a).

Respondent's discussion of the Coupler Act violation is entirely misleading. The evidence of the violation never appeared in the case until defendant called its **last** witness (308a). No amendment was necessary in order to submit the issue to the jury: Rule 15(b). And it was for the jury to decide whether the failure to stop the car at once by coupling did or did not proximately contribute to Barry's death: *Union Pacific R. Co. v. Huxoll*, 245 U. S. 535, 38 S. Ct. 187.

At page 23 of its brief, respondent contends that the coupler act applies only to those actually engaged in coupling. The law is to the contrary both before and after the **Lang** case which it cites:

> *Phila. etc. R. Co. v. Fessler*, 295 F. 650 (CCA 3), cert. den. 264 U. S. 585; 44 S. Ct. 334;
> *Keenan v. Director Gen.*, 285 F. 286 (CCA 2), cert. den. 261 U. S. 616, 43 S. Ct. 361.

Respondent's argument that the cause was in fact submitted to the jury under the Federal Employers' Liability Act is pure "shadow-boxing." Any fair reading of the charge will indicate that the Act was cited by the Trial Judge for jurisdictional purposes only and that nowhere did he indicate that plaintiff was entitled to relief thereunder independent of her rights under the Safety Appliance

Acts. Every direction in the charge was centered upon the alleged violations of the brake Act and even the right of recovery on this issue was effectually eliminated by the Court's erroneous construction of the Act and its erroneous charge as hereinbefore indicated. To quote the Act but fail to charge that recovery may be based upon it in whole or in part can hardly be construed to be a submission to the jury of "the right of the plaintiff to recover under the Federal Employers' Liability Act." Your Honorable Court very recently declared in

> *Blair v. Baltimore & O. R. Co.*, 65 S. Ct. 545, 546: "To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

And again at page 547:

> "The negligence of the employer may be determined by viewing its conduct as a whole. . . . And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and when each imparts character to the others."

(5)

Respondent's argument on this point entirely ignores the language of the charge. At no time during the charge was the jury told that they were permitted to draw reasonable and justifiable inferences from the evidence **in order to determine whether or not the accident occurred by reason of the defendant's negligence.** The jury's right to consider **even the circumstances** was limited by the charge to a prior finding of a defect or inefficiency in the brake (339a):

"Now, if you find that there was a defect in this brake, or it was an inefficient brake, you may take all of the circumstances. . . ."

The jurors were thus told by the Court that they could not consider the circumstances unless they found a defect, language which effectually prevented them from finding **from the circumstances** that the brake was inefficient, despite the plaintiff's specific request, at the conclusion of the Court's charge, that the jury be told that if they found any part of the brake or its appurtenances inefficient, or if the brake as a whole, in its entirety, failed to function when called upon to so function in the ordinary and usual manner, that under those circumstances it would be sufficient to afford the plaintiff the right of recovery in this case. This request was denied and exception granted.

In addition to this glaring error, the trial judge specifically refused to charge the jury as to the inferences that might be drawn in favor of the plaintiff by reason of the death of the decedent (340a, 341a). He conceived the rule to be that the inference (or presumption as it is frequently called) is of moment only in considering the question of the contributory negligence of a decedent.

In the leading case of *Worthington v. Elmer,* 207 Fed. 306, a brakeman was last seen on a car upon which it was his duty to set the brakes. His car collided with another car and he was killed. The nearest brake on the next car was found to be defective. The court there said (308, 309):

"From the facts just pointed out and the most natural and reasonable inference deducible therefrom, it was entirely justifiable to conclude that Rice continued in the performance of his duty respecting the brake on the box car between the time he was seen setting the opposite brake and the collision. As was said in Maguire v. Fitchburg Railroad, 146 Mass. 379, 15 N. E. 904, respecting the evidential effect of finding a deceased

employee's body at a place where his duty had called him:

> "'The jury might well have believed that he was on the track in the performance of his duty and in the exercise of all the care to be expected of a prudent man.' . . .
>
> "This is in principle like the presumption of performance of duty, which, in the absence of evidence to the contrary, is indulged in favor of one who is injured at a railroad crossing; that is, that he stopped, looked and listened before attempting to cross. Baltimore & Potomac R. R. v. Landrigan, 191 U. S. 461, 472, 474, 24 Sup. Ct. 137, 38 L. Ed. 262; P., C., C. & St. L. Ry. Co. v. Scherer, 205 Fed. 356, decided by this court May 6, 1913; Gates v. Beebe, 170 Mich. 107, 112, 135 N. W. 934. The principle so alluded to is applicable under other and varying circumstances, where there is an absence, as here, of direct testimony on the subject in dispute."

In the case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, Mr. Justice Murphy said:

> "The absence of eye witnesses was not decisive. There was testimony that his duties included staying near the north or rear end of the engine as it made its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. **To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death.** Looney v. Metropolitan R. Co., 200 U. S. 480, 488, 26 S. Ct. 303, 306, 50 L. Ed. 564; Atchinson, Topeka & Santa Fe R. Co. v. Toops, supra, 281 U. S. 356, 50 S. Ct.

283, 74 L. Ed. 896; New Aetna Portland Cement Co. v. Hatt, 6 Cir., 231 F. 611, 617."

"His activities, we have a right to assume, centered around the successful completion of his undertaking:"

Chicago, St. P. M. & O. Ry. Co. v. Muldowney, 130 F. 2d 971, 975 (cert. den. 317 U. S. 700, 63 S. Ct. 526).

In a case such as this, depending as it must entirely upon circumstantial evidence, the completely erroneous impression left upon the minds of the jury by such instructions without qualification must be apparent. **Taking the language of the Court and applying it to this record, it constituted a direction to the jury to find for the defendant.** As the Judge stated, no one saw Barry leave the brake step. There was direct evidence that the brake and the step were defective, but there were also circumstances from which the jury may have concluded that whether defective or not, it failed to operate efficiently and stop the car. What caused Barry to fall was a matter solely for inference. As in all circumstantial evidence cases, the inferences reasonably to be drawn from all the evidence could have proved the plaintiff's case. To eliminate and exclude the right of the jury to draw such inferences would be to say that no recovery could be had in any case in which an eye-witness could not be produced to describe all of the operative facts.

Cases resting on circumstantial evidence much less persuasive than the case at bar, have been held to be for the jury under proper instructions:

Baily v. Central Vt. Ry., Inc., 319 U. S. 350, 63 S. Ct. 1062;

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; 64 S. Ct. Rep. 409;

Louisville & N. Ry. Co. v. Summerlin, 18 F. 2d. 950;

St. Louis-S. F. Ry. Co. v. Bishop, 33 S. W. 2d. 383, 182 Ark. 763 (cert. den. 283 U. S. 854, 51 S. Ct. 647);

Ft. Smith & W. R. Co. v. Knott, 159 P. 847, 60 Okl. 175;
Kelly v. Union Pac. Ry. Co., 125 S. W. 818, 141 Mo. App. 490.

Respectfully submitted,

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